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ORIGIN L-03

INFO OCT-01 EUR-25 ISO-00 CIAE-00 COME-00 DODE-00 DOTE-00

EB-11 FMC-04 INR-11 NSAE-00 RSC-01 CG-00 COA-02

DLOS-07 SWF-02 AF-10 ARA-16 EA-11 NEA-14 AID-20

CEA-02 FRB-03 IO-14 OPIC-12 SP-03 TRSE-00 CIEP-03

LAB-06 SIL-01 OMB-01 TAR-02 AGR-20 H-03 /208 R

DRAFTED BY L/EB:FWILLIS/EB/TT/MA:JPSTEINMETZ:E

APPROVED BY EB/TT/MA:JPSTEINMETZ

EUR/RPE:WCLARKE

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P 302153Z SEP 74

FM SECSTATE WASHDC

TO USMISSION OECD PARIS PRIORITY

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E.O. 11652: N/A

TAGS: EWWT,OECD, UN

SUBJECT: COMPATIBILITY OF OECD LIBERALIZATION CODE AND

UN CODE OF CONDUCT FOR LINER CONFERENCES

REF: DAF/MTC/74.33

FOR JOHN GERVERS

REVISED RESPONSE TO REF QUESTIONNAIRE FOLLOWS:

1. SHIPPING CONFERENCES CAN BE CHARACTERIZED AS MONOPO-
LISTIC ASSOCIATIONS OF LINER COMPANIES, WHICH, INTER ALIA,
ACT COLLECTIVELY TO ESTABLISH UNIFORM RATE STRUCTURES,
COORDINATE SAILING SCHEDULES AND ASSIGN PORTS OF CALL.
THEY OFTEN ACT TO RESTRICT CONFERENCE MEMBERSHIP, ENGAGE
IN DEFERRED REBATE PRACTICES AND ALLOCATE MARKET SHARES.

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ALL OF THESE PRACTICES BY THEIR VERY NATURE REDUCE

COMPETITION AND SHIPPERS' CHOICE.

IN THE UNITED STATES FOREIGN TRADES, U.S. GOVERNMENT REGULATION ATTEMPTS TO SUPERVISE CONFERENCE ACTIVITIES AND TO LIMIT THEIR MONOPOLY POWER BY REQUIRING APPROVAL OF ALL CONFERENCE AGREEMENTS AND BY INSISTING THAT THOSE CONFERENCES SERVING AMERICAN PORTS SHOULD BE "OPEN" ON REASONABLE TERMS TO ANY QUALIFIED APPLICANT. DEFERRED

REBATE PRACTICES ARE OUTLAWED. MARKET ALLOCATION SCHEMES ARE SUBJECT TO SPECIFIC GOVERNMENT APPROVAL AND ARE UNLAWFUL UNTIL APPROVED. APPROVAL OF CONFERENCE AGREEMENTS AND MARKET ALLOCATION SCHEMES CANNOT BE GIVEN WHERE SUCH ARRANGEMENTS ARE UNJUSTLY DISCRIMINATORY OR UNFAIR AS BETWEEN SHIPPERS, OR OPERATE TO THE DETRIMENT OF U.S. COMMERCE, OR ARE CONTRARY TO THE PUBLIC INTEREST. (SECTION 15 OF THE 1916 SHIPPING ACT). IMPLICIT IN THESE CONCEPTS IS THE PROMOTION OF "OPPORTUNITY FOR RESIDENTS TO AVAIL THEMSELVES OF...SERVICES OF INTERNATIONAL MARITIME TRANSPORT", "FREE AND FAIR COMPETITION", AND "LIBERAL AND COMPETITIVE COMMERCIAL AND SHIPPING PRACTICES AND PROCEDURES". WITHOUT APPROVAL, THE ARRANGEMENTS WOULD BE CONTRARY TO U.S. ANTI-TRUST LAW. IN MANY OTHER DEVELOPED MARITIME COUNTRIES CONFERENCES HAVE BEEN FREE TO DEVELOP THEIR OWN RULES ON SUCH MATTERS WITH LITTLE OR NO GOVERNMENT INVOLVEMENT TO ASSURE PROTECTION OF A COMPETITIVE ENVIRONMENT. A RESULT, FOR EXAMPLE, HAS BEEN THAT CONFERENCES HAVE TYPICALLY OPERATED AS "CLOSED CONFERENCES".

WHETHER PRESENT CONFERENCE PRACTICES LIMITING COMPETITION VIOLATE THE OECD CODE OF LIBERALIZATION IS A QUESTION DESERVING OF INQUIRY; BUT IT IS TANGENTIAL TO THE CURRENT INQUIRY INTO THE COMPATIBILITY OF THE OECD LIBERALIZATION CODE AND THE UN CONVENTION ON A CODE OF CONDUCT FOR LINER CONFERENCES. THE INVISIBLES COMMITTEE SHOULD GIVE CONSIDERATION TO ADDRESSING THIS MATTER AT A LATER DATE.

2. ARTICLE 47 OF THE CODE OF CONDUCT CLEARLY CONTEMPLATES LIMITED OFFICIAL USE

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PLATES THAT EACH PARTY MUST TAKE THOSE STEPS NECESSARY TO MAKE ALL CODE PROVISIONS, OTHER THAN THOSE RESERVED, THE APPLICABLE LAW IN ITS TERRITORY. IN THE USUAL CASE, THIS WOULD INVOLVE LEGISLATIVE ACTION TO ACCEPT THE TREATY (RATIFICATION OR ACCESSION), AS WELL AS ENACTMENT OF IMPLEMENTING LEGISLATION. NON-CONTRACTING STATES, NATURALLY, WOULD NOT HAVE TO COMPLY WITH THE UN CONVENTION, AND ANY CONFLICTS OF JURISDICTION WOULD HAVE TO

BE RESOLVED ON A BILATERAL OR MULTILATERAL BASIS DEPENDING ON THE PARTIES INVOLVED.

FOR THE UNITED STATES, IMPLEMENTING LEGISLATION WOULD REQUIRE REPEAL OF BASIC PRINCIPLES WHICH HAVE GOVERNED SHIPPING IN AMERICA FOR MORE THAN 50 YEARS. THIS WOULD INCLUDE THE ELIMINATION OF THE OPEN CONFERENCE SYSTEM AND AS WE READ THE CODE, AN ACROSS-THE-BOARD

ESTABLISHMENT OF CARGO ALLOCATION FOR ALL COMMERCIAL CARGOES ON A 40-40-20 FORMULA BASED ON THE NATIONALITY OF SHIPPING LINES CONCERNED. IT WOULD ALSO REQUIRE SUBSTANTIAL REVISION OF EXISTING SHIPPING LAW ON, INTER ALIA, FREIGHT RATES AND SETTLEMENT OF DISPUTES.

3. FOR U.S. TRADES, AS INDICATED ABOVE, OPEN CONFERENCES WOULD BE ELIMINATED AND REPLACED BY CLOSED CONFERENCES, AT LEAST IN RESPECT OF THIRD-COUNTRY CARRIERS. LIKEWISE, IT COULD BE ANTICIPATED THAT U.S. CARRIERS, WHERE THEY WOULD ACT AS THIRD COUNTRY SHIPPING LINES, WOULD BE REFUSED ADMISSION TO THE RESPECTIVE CONFERENCE IN MANY CASES. ON THE OTHER HAND, CONFERENCES WOULD APPEAR TO BE OPEN IN ALL CASES WITH RESPECT TO ALL NATIONAL SHIPPING LINES IN EACH TRADE INVOLVED.

4. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 2 OF THE LINER CONFERENCE CODE, ANY VARIATION FROM THE CARGO SHARING FORMULA REQUIRES MUTUAL AGREEMENT. WHILE THE DRAFTING OF ARTICLE 2 IS UNCLEAR AND THERE IS LITTLE LEGISLATIVE HISTORY, "MUTUAL AGREEMENT" WOULD APPEAR TO REQUIRE AT LEAST UNANIMOUS AGREEMENT BETWEEN THE NATIONAL SHIPPING LINES OF THE CONFERENCE IN THE TRADE CONCERNED. THEREFORE, IT WOULD APPEAR THAT VARIATIONS LIMITED OFFICIAL USE

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IN THE CODE FORMULA WOULD ONLY TAKE PLACE WHEN NO NATIONAL SHIPPING LINE OF THE TRADE INVOLVED INSISTED ON ITS QUOTA UNDER THE CODE.

5. FOR MORE THAN 50 YEARS THE UNITED STATES HAS SUPPORTED THE PRINCIPLE OF OPEN CONFERENCES. DEMANDS BY ANY COUNTRIES PARTY TO THE UN CODE OF CONDUCT TO RESTRUCTURE CONFERENCES TO REFLECT MEMBERSHIP CRITERIA CONTAINED IN THE CODE WOULD BE CONTRARY TO THIS FUNDAMENTAL ELEMENT OF U.S. SHIPPING LEGISLATION AND WOULD GIVE RISE TO CONFLICTS OF JURISDICTION WHICH MOST LIKELY WOULD REQUIRE INTERGOVERNMENTAL NEGOTIATIONS FOR RESOLUTION.

7. WHERE CARGO-SHARING ARRANGEMENTS ARE PERMITTED, SOME INCORPORATE THE 40-40-20 PRINCIPLE, WHILE OTHERS

USE DIFFERENT FORMULAE.

8. THE LANGUAGE OF THIS CRITICAL ARTICLE IS UNCLEAR, AND ITS SUBSTANTIVE MEANING IS AMBIGUOUS WHEN READ IN CONJUNCTION WITH OTHER CODE PROVISIONS. THERE IS NO LEGISLATIVE HISTORY ON THE ARTICLE, SINCE IT WAS INTRODUCED AT THE END OF THE CONFERENCE AND VOTED ON WITHOUT EXPLANATION OR DEBATE. RELATED TO QUESTION 8 IS THE SCOPE OF APPLICABILITY OF THE CODE, BUT THIS SUBJECT

ALSO WOULD NOT APPEAR TO HAVE BEEN RESOLVED CLEARLY. EFFORTS AT THE GENEVA CONFERENCE TO CLARIFY THE SCOPE OF THE CODE WERE UNSUCCESSFUL, AND VERY LITTLE DEBATE WAS HELD ON THIS POINT. IN VIEW OF THESE DIFFICULTIES, THE QUESTION OF THIRD COUNTRY RIGHTS WILL REMAIN UNDER REVIEW.

9. WE BELIEVE SUBSTANTIAL RESTRICTIONS WOULD BE PLACED ON RESIDENTS IN OECD MEMBER COUNTRIES TO AVAIL THEMSELVES OF SERVICES IN CONNECTION WITH INTERNATIONAL MARITIME TRANSPORT IN VIEW OF THE CLOSED CONFERENCE AND CARGO SHARING PROVISIONS OF THE CODE.

10. THE CONVENTION DOES NOT REGULATE OUTSIDERS. ONE OF THE RESOLUTIONS ADOPTED BY THE CONFERENCE WOULD APPEAR TO CALL FOR COMPETITION BY OUTSIDERS. ON THE OTHER LIMITED OFFICIAL USE

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HAND, THE CONCLUDING STATEMENT AT THE GENEVA CONFERENCE MADE ON BEHALF OF THE GROUP OF 77 WOULD INDICATE THE POSSIBILITY OF SEVERE RESTRICTIONS ON THE ROLE OF OUTSIDERS. IN ANY EVENT, THE POSITION OF SHIPPING CONCERNS OF COUNTRIES NOT SIGNATORIES (PARTIES) TO THE CODE SEEMS UNCLEAR, SINCE, AS INDICATED IN THE ANSWER TO QUESTION 8, THE SCOPE OF APPLICABILITY OF THE CODE DOES NOT APPEAR TO BE WELL DEFINED.

11. IT IS UNLIKELY THAT THEY WOULD BE ABLE TO DO SO BECAUSE OF THE COMPLEXITY OF THE CODE RULES AND INNUMERABLE INTERPRETATIONS OF IT THAT CAN BE EXPECTED. IT IS OUR BELIEF THAT THE CODE WILL LEAD TO GREATER GOVERNMENT REGULATION, AND CONFLICT, AS EFFORTS ARE MADE TO INTERPRET THE CODE AND AS INCONSISTENT POSITIONS ARE TAKEN BY GOVERNMENTS AT EITHER END OF A TRADE.

12. RESPONSE TO DAF/MTC/74.31 WILL BE CABLED "IMMEDIATE" OCTOBER 1, AM. INGERSOLL

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: MARINE TRANSPORTATION, STANDARDS, CARGO SHIPS
Control Number: n/a
Copy: SINGLE
Draft Date: 30 SEP 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: CollinP0
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974STATE215364
Document Source: CORE
Document Unique ID: 00
Drafter: FWILLIS/EB/TT/MA:JPSTEINMETZ:E
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D740275-0970
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t1974091/aaaaaaww.tel
Line Count: 220
Locator: TEXT ON-LINE, ON MICROFILM
Office: ORIGIN L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators:
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: DAF/MTC/74.33
Review Action: RELEASED, APPROVED
Review Authority: CollinP0
Review Comment: n/a
Review Content Flags:
Review Date: 02 MAY 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <02 MAY 2002 by ifshinsr>; APPROVED <06 MAR 2003 by CollinP0>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: COMPATIBILITY OF OECD LIBERALIZATION CODE AND UN CODE OF CONDUCT FOR LINER CONFERENCES
TAGS: EWWT, OCON, OECD, UN
To: OECD PARIS
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005